STATE OF MICHIGAN

COURT OF APPEALS

JOHN CASTLE, Personal Representative of the Estate of BETTY SUE GOLLIVER, a/k/a BETTY SUE DEISING, Deceased, Plaintiff-Counter-Defendant-Appellee,	UNPUBLISHED May 25, 2001
v	No. 216200 Berrien Circuit Court
MARC FREDERICK DEISING, Defendant-Counterplaintiff-Appellant.	LC No. 97-001561-DO

Before: Talbot, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals by right from the trial court's judgment granting plaintiff a divorce.[1] We affirm.

I. Annulment

Defendant first argues that the trial court erred in denying his request to annul his marriage to plaintiff. A suit to annul a marriage is equitable in nature, MCL 552.12; MSA 25.92, and thus the trial court's decision to deny defendant's request to annul his marriage is reviewed de novo, *Yager v Yager*, 313 Mich 300, 304; 21 NW2d 138 (1946); see, also, *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 582; 458 NW2d 659 (1990) (this Court's review is de novo when equity is involved).

The grounds for annulment of a marriage are provided for by statute:

> In case of a marriage solemnized when . . . the consent of 1 of the parties was obtained by force or fraud, and there shall have been no subsequent voluntary

[1] We note that as a result of plaintiff's death on May 24, 2000, the personal representative of plaintiff's estate has been substituted as the appellee in this matter. Nonetheless, for purposes of this opinion, we will continue to refer to the deceased as "plaintiff."

> cohabitation of the parties, the marriage shall be deemed void, without any decree of divorce or other legal process. [MCL 552.2; MSA 25.82]

Defendant alleged during trial that before the marriage, plaintiff misrepresented her age, education, the number of times she had been previously married, and the fact that she had twice been pregnant with his child. Defendant asserts that these misrepresentations when considered together are sufficient fraud to warrant an annulment; therefore, the trial court erred in failing to do so. We disagree.

The law has long recognized a public interest in the preservation of marriages. See *Hess v Pettigrew*, 261 Mich 618, 621-622; 247 NW 90 (1933). Thus, it has been held that the fraud necessary to vitiate a marriage contract must be of a nature wholly subversive of the "true essence" of the parties' relationship, and be shown to have affected the free conduct of the wronged party. *Yanoff v Yanoff*, 237 Mich 383, 387-389; 211 NW 735 (1927) (finding such conditions to be present where "the marriage was brought about by falsely representing a pregnancy").

Here, we agree with the trial court that the misrepresentations asserted by defendant, even if true, were insufficient to support annulment of the marriage under MCL 552.2; MSA 25.82, as these misrepresentations were not of a nature wholly subversive of the true essence of the parties' relationship. *Yanoff*, *supra* at 387. As noted by the trial court, defendant did not allege that he entered into the marriage under the false impression that plaintiff was at that time pregnant with his child. Moreover, there is nothing in the record on which to base a finding that plaintiff's age and level of education were significant factors within the parties' relationship. This is especially true when one considers the minor nature of plaintiff's asserted misrepresentation regarding her age and the professional character of plaintiff's employment during the relationship, in conjunction with defendant's own misrepresentations as to the extent of his educational endeavors. Moreover, although in some cases the fact of a previous marriage may be a significant factor underlying a party's decision to enter into a marriage, in the instant matter defendant acknowledged during trial that he was aware that plaintiff had been married on at least three prior occasions. In light of this admission and considering that defendant himself had been previously married, we are not persuaded by defendant's claim that plaintiff's prior marriages were a factor that he considered to be of significance in the parties' relationship. See *Hess*, *supra* at 622-624.

Therefore, we do not believe that the trial court erred in denying defendant's request for annulment of the marriage.

II. Property Disposition

A. Trial Court's Findings of Fact

Defendant next challenges the trial court's award to plaintiff of fifty-five percent of the $254,919 marital estate. In doing so, defendant claims that the trial court erred in several of its factual determinations and that correction of these errors requires that plaintiff's award be reduced to no more than fifty percent of the marital estate. Again, we do not agree.

A trial court's findings of fact in a divorce case are reviewed under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). If the trial court's findings of fact are upheld, this Court must then decide whether the dispositive ruling was fair and equitable in light of those facts. *Id*. at 151-152. The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

Defendant first contends that the trial court erred in finding that he possessed a "significant sexual appetite" that adversely affected the marriage. Specifically, defendant asserts that there was "no basis" for the trial court's finding in this regard. However, contrary to this assertion, plaintiff testified at trial that defendant had characterized himself to her as a "sexual predator." This testimony, when considered in connection with defendant's admission that he had been involved in an affair while married to his first wife, that he had begun seeing plaintiff while separated from his first wife, and that he had begun a relationship with another woman shortly after separating from plaintiff, was sufficient to support the trial court's finding that defendant had a "significant sexual appetite." Therefore, the trial court's finding in this regard was not clear error.

Similarly, we find no error in the trial court's determination that plaintiff's drinking was not the principal factor in the breakdown of the parties' marriage. During her deposition in this matter, Dr. Susan Hayward testified that a review of plaintiff's medical records failed to disclose any of the symptoms associated with chronic alcoholism. Hayward also testified that although in May of 1997, plaintiff had been admitted to Lakeland Hospital with an exceedingly high blood alcohol content, she believed that incident to have been "situational" and related to stress resulting from the divorce proceedings that were ongoing at that time. Moreover, in addition to Hayward's deposition testimony, several witnesses associated with the parties testified during trial that before meeting defendant, plaintiff was merely a social drinker, but that after she began seeing defendant her drinking significantly increased and constituted a large part of the couple's social activities.

Defendant also contends that the trial court erred in finding that plaintiff's current state of unemployment was a result of her leaving her position at Southern Michigan Bank and Trust at defendant's suggestion. Given the testimony on this issue at trial, we again find no error in the trial court's findings.

Both Janet Boesch and Tony Johnson, plaintiff's coworkers at Southern Michigan, testified that defendant was a significant force in plaintiff's decision to terminate her employment at the bank. In fact, Boesch specifically testified that during one conversation with defendant in either late 1994 or early 1995, defendant specifically asked that she talk plaintiff into "quitting the bank," stating that plaintiff did not need to work because he would "take care of her."

Boesch's testimony in this regard was mirrored by that of Amy Brehm, plaintiff's daughter, who indicated at trial that she had been involved in several similar conversations with defendant wherein defendant stated that he had been trying to convince plaintiff to quit her job because "he felt that she didn't need to be working." Moreover, although plaintiff did acknowledge that there problems at the bank that made it an undesirable place to work, she

further indicated that she would not have left her employment there had it not been for defendant's assurances that he was there to "take care" of her. In light of this testimony, we cannot conclude that the trial court erred in determining that plaintiff left her employ with the bank at defendant's urging.

Defendant next argues that in light of the trial court's acknowledgment that plaintiff perjured herself at trial with respect to her age and high school graduation date, it was error for the trial court to believe any of her testimony with respect to the parties' marital relationship. However, given the relatively minor nature of this testimony, and considering the deference afforded the trial court on matters of credibility, *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991), we find no error in the trial court's reliance on the remainder of plaintiff's testimony at trial.

Moreover, we find that the trial court's award of fifty-five percent of the marital estate to plaintiff was, in and of itself, both fair and equitable. When apportioning a marital estate, the trial court's goal is to reach an equitable division in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). However, such equity does not require that each spouse receive a mathematically equal share. *Id*. "When dividing the estate, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health, and needs, fault or past misconduct, and any other equitable circumstance." *Id*. at 115. Although the significance of these factors will vary depending on the facts of a given case, each factor need not be given equal weight where the circumstances dictate otherwise. *Id*.

Despite the emphasis placed on the trial court's factual findings as addressed above, the trial court clearly indicated at trial that its decision to award plaintiff slightly more was based on plaintiff's poor health. With that premise in mind, the trial court found that defendant's substantial assets and clear ability to provide for himself when contrasted against plaintiff's poor health and limited prospects for obtaining employment as a result of those health problems, warranted a disposition slightly in favor of plaintiff.

Given that defendant does not contest the trial court's findings as to plaintiff's health or earning ability, we find the trial court's award to plaintiff of fifty-five percent of the marital estate to be both fair and equitable under the circumstances.

B. Valuation of Marital Estate

Plaintiff's share of the $254,919 marital estate of $140,205 was comprised of $12,200 equity in a Lexus automobile, jewelry valued at $7,000, and a cash award of $121,005 to be paid by defendant. Defendant now argues that the trial court erred in determining the parties' equity in the Lexus to be only $12,200. However, in doing so defendant does not contest the valuation of this vehicle at $21,000, but rather contends that the $12,200 equity was erroneously premised on a debt of $8,800. According to defendant, although this figure correctly represented the extent of debt as of December 1997, that debt had been reduced to the sum of only $4,100 by July 1998, i.e., the time at which the trial court awarded it to plaintiff. Therefore, defendant argues, plaintiff was in actuality awarded an asset in which the equity was $4,700 higher than the trial court

realized, and thus her cash award of $121,005 should be reduced by this same amount. We disagree.

Although for the purpose of dividing property, a trial court typically values marital assets at the time judgment is entered, it may, in its discretion, use a different date. *Byington*, *supra* at 114 n 4. In this case, following entry of the final judgment of divorce, defendant moved to amend the trial court's findings pursuant to MCR 2.611(A). Defendant presented the instant argument, among others at that time, and the trial court addressed it during the hearing on that motion. The trial court noted that while defendant was correct in his assertion that payments made on the vehicle during the relevant time period would have increased the equity in the vehicle, because those payments were made for the benefit of plaintiff pursuant to the temporary order of support, defendant was not entitled to any credit for the increased value. Given that the trial court's ruling in this regard reflects a decision based on the nature of the payments defendant made during the relevant time period to use a valuation date earlier than July 1998, we find the result to be both fair and equitable.

Defendant further argues, however, that it was error for the trial court to even include the Lexus as a separate item within the marital estate. In doing so, defendant asserts that as an asset of Mar-Co Packaging, a business wholly owned by defendant, any equity in the vehicle had already been included in determining the value of defendant's businesses, a portion of which, $106,000, had already been included within the marital estate. Thus, defendant argues, by also including the car as a separate item within the marital estate the trial court erroneously included the equity in this vehicle twice when determining the value of the marital estate, and that in order to rectify this error, plaintiff's cash award must be reduced by the amount of the equity in that vehicle. Again, we disagree.

Defendant's argument appears to be erroneously premised on the notion that the $106,000 included by the trial court as part of the marital estate was an amount based solely on the value of assets held by Mar-Co Packaging. However, a review of the valuation reports prepared by plaintiff's accountant and used by the trial court in determining what portion of defendant's business holdings would be included in the marital estate reveals that this figure represents a much broader valuation, i.e., the increase in value of defendant's holdings in each of the four businesses in which defendant held an interest at the time the parties were married.

As defendant notes, when determining the increase in value of stock held in Mar-Co Packaging, the accountant included $12,000 worth of equity in the Lexus as an asset connected to Mar-Co Packaging. Considering that this figure represents less than 1½ percent of the more than $817,000 in assets used by the accountant in arriving at the $8,694 increase in stock value attributable to Mar-Co Packaging, as well as the fact that Mar-Co Packaging stock accounted for only eight percent of the total $106,000 valuation, we find that any effect that the vehicle's equity would have had on the overall figure was negligible, and in any event is not specifically determinable from the record currently before this Court. Therefore, we decline defendant any relief on this argument.

Defendant next asserts that because the $105,243 worth of equity in the parties' home was mainly comprised of a $100,000 down payment obtained from bonuses defendant had earned

from Mar-Co Packaging before the parties had married, the trial court erred in including this equity as part of the marital estate. Again, we disagree.

This issue, too, was raised and decided by the trial court at the hearing on defendant's motion for amendment of the trial court's findings. At that time, the trial court accepted defendant's allegations concerning the nature and amount of the down payment on the parties' home as true, but indicated that inasmuch as it possessed authority to invade the separate assets of a spouse, it would deny defendant's request. We find no error in the trial court's decision in this regard.

"Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party's own separate estate with no invasion by the other party." *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). However, as correctly noted by the trial court, in certain situations a spouse's separate assets may be included in the marital estate. *Id*. In particular, MCL 552.23(1); MSA 25.103(1) permits invasion of the separate estates if after division of the marital assets, "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party . . . ."

Here, the trial court's ruling reflects a determination, consistent with MCL 552.23(1); MSA 25.103(1), that without inclusion of the equity in the parties' home, the marital estate would have been insufficient to provide plaintiff with suitable support. Defendant offers no facts or evidence on which to base a finding that the trial court's conclusion in this regard was error. Therefore, we will not grant defendant the requested relief.

III. Spousal Support

Defendant next argues that the trial court erred in awarding plaintiff spousal support at the rate of $2,500 per month for a period of twenty-four months. A trial court's decision regarding alimony must be affirmed unless the reviewing court is firmly convinced that it was inequitable. *Sparks*, *supra.*

In challenging the trial court's award of alimony, defendant first reiterates those claims of factual error discussed under Part II A of this opinion, alleging that these erroneous findings invalidate any such award. However, as noted above, we find no error in the trial court's factual determinations. Thus, the question becomes whether the trial court's dispositional ruling concerning the award of alimony was equitable. *Id*.

In this respect, defendant argues that because plaintiff was able to survive on the $1,000 per month provided under the temporary support order issued in this case, the trial court's award of an additional $1,500 per month was unnecessary and inequitable. We find no such inequity here.

As noted by plaintiff, this temporary order, although providing for a cash payment of $1,000 per month, also required that defendant pay such additional expenses as the mortgage on the parties' home, health insurance for plaintiff, the payments on the Lexus, and several other household bills such as electricity, water, sewer, and telephone. Under the judgment of divorce, plaintiff is now responsible for all such necessary living expenses previously paid by defendant

under the temporary order, and defendant has failed to offer any argument or facts supporting that this change in circumstance does not justify the increase in the amount of cash paid to plaintiff as spousal support.

Defendant further argues, however, that this award is inequitable because the twenty-four-month period of alimony exceeds the length of the parties' short marriage. Again, we disagree.

In an action for divorce, a trial court has the discretion to award alimony as it considers just and reasonable. MCL 552.23; MSA 25.103; *Ianitelli v Ianitelli*, 199 Mich App 641, 642-643; 502 NW2d 691 (1993). Relevant factors for the trial court to consider include the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health, fault, if any, and any other circumstances of the case. *Id*. at 643; *Demman v Demman*, 195 Mich App 109, 110-111; 489 NW2d 161 (1992). The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Hanaway v Hanaway*, 208 Mich App 278, 295; 527 NW2d 792 (1995).

Here, although the trial court considered each of the above factors in awarding plaintiff alimony, it noted that despite the relatively short duration of the marriage, plaintiff 's health and current employment situation warranted a period and amount of alimony sufficient to allow plaintiff time to reestablish her life as an individual. We find the trial court's decision in this regard to be supported by the record and thus conclude that the twenty-four-month period of alimony was warranted in equity.[2]

IV. Attorney Fees

Defendant's final argument on appeal is that the trial court abused its discretion in awarding plaintiff attorney fees in the amount of $18,000. We disagree.

A party in a domestic relations matter who is unable to bear the expense of attorney fees may recover reasonable attorney fees if the other party is able to pay. MCR 3.206(C)(2). Such fees may also be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation. *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992). A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993).

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[2] As previously noted, plaintiff died on May 24, 2000 before the twenty-four-month period of spousal support was satisfied. The trial court's oral opinion in this matter included a limitation on alimony that provided that such rehabilitative payments would cease upon plaintiff's death. However, the judgment of divorce did not contain the above limitation. Because a court speaks through its orders, and this Court's jurisdiction is confined to judgments and orders, *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999), we decline to modify the spousal award on the basis of plaintiff's death. However, defendant may petition the trial court to reduce spousal support to the actual months during which plaintiff actually survived the judgment. See MCL 552.28; MSA 25.106.

Defendant argues that inasmuch as the trial court found that both parties' conduct contributed to the large attorney fees in this matter, its decision to award plaintiff attorney fees was an abuse of discretion. However, given that the trial court further found that plaintiff required financial aid to maintain this suit, we cannot say that the trial court abused its discretion in awarding the attorney fees. See, e.g., *Hanaway, supra* at 299.

We further reject defendant's claim that because there is no justification for plaintiff 's having retained two attorneys to represent her at each hearing held in this matter, the trial court's award of fees was an abuse of discretion. Contrary to defendant's assertion, however, with the exception of trial and the hearing on defendant's motion to amend the judgment, plaintiff was represented by only one of the two attorneys who filed an appearance on her behalf. Given that the bills plaintiff submitted in support of her request for fees included only fees incurred up to the time of trial, and nothing within these bills suggests that the attorneys' separate efforts overlapped and inflated plaintiff 's legal costs, we do not believe that the mere fact that plaintiff had retained two attorneys renders the trial court's award of attorney fees an abuse of discretion.

V. Plaintiff 's Request for Sanctions

Plaintiff contends that this Court should award her sanctions against defendants for bringing a vexatious appeal. However, although we agree that a majority of the issues raised by defendant were of little merit, we cannot say that there was no "reasonable basis" for the appeal. MCR 7.216(C). Defendant's request for review of the trial court's decision to deny annulment of the marriage, although found to be an issue on which defendant should not prevail, was not wholly without merit. Thus, we find that sanctions pursuant to MCR 7.216(C)(1)(a) are not warranted. See *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 603; 552 NW2d 523 (1996).

We affirm.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Jane E. Markey